

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK MARING, et al.,

Plaintiffs,

v.

PG ALASKA CRAB INVESTMENT CO.,
LLC, et al.,

Defendants.

CASE NO. C05-326JLR

ORDER

I. INTRODUCTION

This matter comes before the court on a motion for summary judgment from Plaintiff Mark Maring and a collection of corporate entity Plaintiffs. (Dkt. # 13). Although Mr. Maring has requested oral argument, the court finds this motion appropriate for disposition on the basis of the parties' briefing and accompanying declarations. For the reasons stated below, the court DENIES Mr. Maring's motion.

II. BACKGROUND

Mr. Maring is the principal in a network of corporate entities engaged in commercial fishing in the Pacific Ocean. Although Mr. Maring and those entities are Plaintiffs here, the court will refer to Plaintiffs as "Mr. Maring" unless a distinction is important. In 2000, Mr. Maring obtained a loan (or a series of loans) from Defendant PG Alaska Crab Investment Co., LLC ("PGA") to finance his fishing enterprise. Although

1 the parties dispute the amount and terms of the loan, it was for more than \$4,000,000 at
2 an interest rate of at least 12 percent. Mr. Maring defaulted on the loan in late 2001.

3 In 2004, the parties began discussions about an agreement to settle the unpaid loan
4 balance. The discussions cumulated on January 11, 2005 with a Settlement Agreement.
5 The Settlement Agreement required Mr. Maring to transfer to PGA a \$7.4 million
6 payment he received from the sale of two of his vessels to the National Marine Fisheries
7 Service's ("NMFS") Vessel Buyback Program. It also required that Mr. Maring deliver
8 all of his Alaska fishing permits and supporting documentation to PGA, including his
9 interest in a Processing Quota Share ("PQS") permit for his NORTHLAND vessel. Mr.
10 Maring petitioned the United States government for a hardship exception that would
11 allow the NORTHLAND to participate in crab fishing with a PQS permit. Mr. Maring's
12 representations about the PQS permit and PGA's understanding of the permit's status are
13 the subject of pointed disputes between the parties. Upon performance of Mr. Maring's
14 obligations, the Settlement Agreement required PGA to pay Mr. Maring \$275,000 and to
15 release liens on some of Mr. Maring's vessels.
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18 PGA has undisputedly not performed its duties under the Settlement Agreement.
19 PGA contends that its performance is excused for two reasons: Mr. Maring did not
20 satisfactorily perform his part of the Settlement Agreement; and Mr. Maring and his
21 agents improperly induced PGA to enter the Settlement Agreement by misrepresenting
22 the status and value of the NORTHLAND PQS permit.
23

24 Mr. Maring brings this summary judgment motion seeking summary adjudication
25 of PGA's liability under the Settlement Agreement. He also moves for summary
26 judgment against PGA's counterclaims for fraud, negligent misrepresentation,
27 reformation of the Settlement Agreement, and declaratory judgment.
28

III. ANALYSIS

In examining Mr. Maring's summary judgment motion, the court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden to demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the opposing party must show that there is a genuine issue of fact. Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The opposing party must present significant and probative evidence to support its claim or defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). Where a question presented is purely legal, summary judgment is appropriate without deference to the non-moving party.

A. Disputed Facts Prevent the Court from Entering Summary Judgment Against PGA's Counterclaims.

PGA challenges the underpinnings of the Settlement Agreement in its counterclaims for fraud, negligent misrepresentation, and reformation.¹ All three counterclaims arise from PGA's contention that Mr. Maring and his agents misrepresented the status and value of the NORTHLAND PQS permit.

Mr. Maring's alleged misrepresentations regarding the NORTHLAND PQS permit are a common element in each of PGA's counterclaims. A party claiming fraud or negligent misrepresentation must prove that the opposing party made a false

¹The court reserves a discussion of PGA's declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing counterclaims for the end of this order.

1 representation of material fact. Guarino v. Interactive Objects, Inc., 86 P.3d 1175, 1191-
2 93 (Wash. Ct. App. 2004). Similarly, a claim for contract reformation requires either a
3 mutual mistake or one party's mistake coupled with inequitable conduct by the other
4 party. Denaxas v. Sandstone Court of Bellevue, LLC, 63 P.3d 125, 132 (Wash. 2003).

5 PGA offers evidence to demonstrate that Mr. Maring misrepresented the status and
6 value of the NORTHLAND PQS permit. According to James Paduano, a managing
7 member of PGA, Mr. Maring either stated or implied during settlement negotiations that
8 he had successfully lobbied the North Pacific Fishery Management Council to grant the
9 NORTHLAND a PQS permit. Paduano Decl. ¶ 32. Mr. Maring repeatedly represented
10 to PGA that his lobbyist obtained specific regulatory language that entitled the
11 NORTHLAND to a PQS permit. Id. Mr. Paduano claims that Mr. Maring led PGA to
12 believe that the permit either existed or would soon exist. According to Charles
13 Greenburg, another PGA member, Mr. Maring bolstered PGA's impression that the
14 NORTHLAND PQS permit existed when he introduced an "Orion Group Asset List" in
15 July 2004 that set the value of the NORTHLAND PQS permit at \$2.5 million.

16 Greenberg Decl. ¶ 12, Ex. A. Mark Calvert and Ron Graves, two individuals who helped
17 Mr. Maring prepare valuations of his various assets,² valued the NORTHLAND PQS
18 permit at a minimum of \$500,000 and as much as \$2,500,000. Greenberg Decl. ¶¶ 5, 7,
19 12; Paduano Decl. ¶ 31. At a January 7, 2005 meeting, Mr. Anderson, another advisor to
20 Mr. Maring, stated to Mr. Paduano that Mr. Maring was willing to give up his "most
21 valuable" fishing permit, the NORTHLAND PQS. Id. at ¶ 30; Greenberg Decl. ¶ 7. Mr.
22 Paduano and Mr. Greenberg both aver that they concluded that the NORTHLAND PQS
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27 ²The parties dispute whether Mr. Graves and Mr. Calvert were acting on Mr. Maring's
28 behalf in settlement negotiations, but the court cannot resolve the conflicting evidence. At this
stage, the court assumes (as it must) that Mr. Graves and Mr. Calvert were Mr. Maring's agents.

1 permit was either in Mr. Maring's possession or was certain to be in his possession
2 shortly. Paduano Decl. ¶ 32; Greenberg Decl. ¶ 7. PGA asserts that it was not until
3 January 28, 2005, when Jack Cullen, counsel for Mr. Maring, notified them that the
4 NORTHLAND PQS permit was not deliverable, that it discovered that the permit did not
5 exist. Paduano Decl. ¶ 36; Greenberg Decl. ¶ 8.

6
7 Mr. Maring, on the other hand, asserts that PGA knew that he did not have the
8 NORTHLAND PQS permit and that his projections that he would obtain it were
9 speculative. From 2001 to the January 2005 conference, Mr. Maring repeatedly apprised
10 PGA of his lobbying efforts to secure a PQS permit. Maring Decl. ¶ 27. For example,
11 on November 4, 2004, Mr. Maring sent an email to Mr. Paduano containing a link to the
12 proposed rule that would implement the PQS program. Id. While Mr. Maring admits
13 that he told PGA that he was confident that the NORTHLAND would obtain a PQS
14 permit, he denies telling PGA that he actually had a permit. Id. at ¶ 28. In several
15 discussions with Mr. Paduano, Mr. Maring estimated the value of a PQS permit,
16 assuming the NORTHLAND qualified for one, to be between zero and over \$2 million,
17 based on his best guess. Id. He claims that on January 3, 2005 and January 12, 2005, he
18 gave PGA documents describing the status of the PQS permit, including a summary of
19 the NORTHLAND's processing history for the years 1990-1997. Id. at ¶ 29. Mr.
20 Maring contends that these documents show that he did not possess a PQS permit. Id.
21 Mr. Calvert, for his part, denies discussing the NORTHLAND PQS permit at a January 7,
22 2005 meeting with PGA. Calvert Decl. ¶ 17. Mr. Cullen also disputes PGA's assertion
23 that the parties discussed the PQS permit during the January 7, 2005 settlement meeting.
24 Cullen Decl. ¶ 9.

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27 The disputes over the NORTHLAND PQS permit prevent the court from entering
28 summary judgment against PGA's counterclaims. The court cannot resolve the

1 counterclaims without first resolving the conflicting evidence regarding Mr. Maring's
 2 representations about the NORTHLAND PQS permit in the negotiations leading to
 3 settlement. The court cannot resolve the conflicting evidence on a motion for summary
 4 judgment.

5 **B. Factual Disputes Also Prevent the Court From Entering Summary Judgment**
 6 **on PGA's Liability Under the Settlement Agreement.**

7 In addition to the dispute over the PQS permit, the parties dispute whether the
 8 Settlement Agreement establishes conditions precedent to PGA's performance, and
 9 whether Mr. Maring complied with these conditions. As a threshold matter, the court
 10 notes that PGA's counterclaims raise questions about whether the Settlement Agreement
 11 can be enforced on its existing terms. The court assumes that it is enforceable for
 12 purposes of this motion.
 13

14 **1. The Settlement Agreement Imposes Conditions Precedent on Mr.**
 15 **Maring.**

16 The Settlement Agreement establishes an order of performance of the parties'
 17 obligations:

18 The Parties shall cooperate in good faith to prepare and execute final
 19 documentation setting forth the settlement agreement consistent with this
 20 Agreement, *so long as the conditions set forth in ¶ 3, below, are fully performed*
 21 *by the specified deadlines. . . .* The parties contemplate closing to occur on or
 22 before January 24, 2005.

23 Agreement ¶ 2 (emphasis supplied). Paragraph 3 of the Agreement establishes conditions
 24 that Mr. Maring must perform. It requires that Mr. Maring transfer to PGA the \$7.4
 25 million in proceeds resulting from the sale of two vessels in NMFS' Vessel Buyback
 26 Program, relinquish all interest of any kind in Alaska fishing permits to PGA, and
 27 execute an irrevocable power of attorney allowing PGA to execute all documents related
 28 to the Alaska fishing permits. Agreement ¶ 3.

1 The court holds as a matter of law that the conditions in paragraph 3 of the
2 Settlement Agreement are conditions precedent to PGA's performance. Where contract
3 terms are unambiguous, the court can interpret the contract as a matter of law. Absher
4 Constr. Co. v. Kent School Dist. No. 415, 890 P.2d 1071, 1073 (Wash. Ct. App. 1995).
5 Under the Agreement, the critical aspects of PGA's performance need not occur until
6 "Closing," "as part of the final documentation at Closing," and after Mr. Maring has
7 "complied fully with all obligations." Agreement ¶¶ 5-7. While the Agreement does not
8 define the term "Closing," its meaning is clear. An examination of the other contract
9 provisions indicates that "Closing" is synonymous with the date of execution of final
10 documentation. Mr. Maring's performance of the conditions in paragraph 3, however,
11 must occur before closing. As paragraph 3 imposes conditions precedent on Mr. Maring
12 as a matter of law, PGA had no obligations under the Settlement Agreement unless Mr.
13 Maring performed his obligations first.
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16 **2. Disputed Facts Prevent the Court from Determining if Mr. Maring**
17 **Complied with the Conditions Precedent.**

18 The court focuses on two of the conditions precedent: Mr. Maring's obligation to
19 transfer proceeds of the sale of two vessels to PGA, and Mr. Maring's obligation to
20 disclose information about his existing fishing permits.

21 **a. Mr. Maring Complied with the Condition Precedent Requiring**
22 **Transfer of Proceeds from the Sale of His Vessels.**

23 The Settlement Agreement requires Mr. Maring to transfer \$7.4 million in vessel
24 sale proceeds to PGA. Agreement ¶ 3.a. The parties do not dispute that Mr. Maring
25 delivered the tender of payment documents in a timely manner, and that he did not
26 complete the portion of the documents requiring information on the payee. The parties
27 dispute whether PGA instructed Mr. Maring to leave the payee section blank. Mr.
28 Maring alleges that "[he] did not complete that portion of the documents indicating the

1 payee as PG Alaska had previously indicated that it may wish to have the payments or a
2 portion thereof directed to an affiliate entity.” Maring Decl. ¶ 19. PGA “categorically
3 denies instructing Mr. Maring to leave the payee section of these documents blank.”
4 Paduano Decl. ¶ 35a.

5 The court finds that, even taking the facts in the light most favorable to PGA, Mr.
6 Maring transferred the vessel sale proceeds as contemplated in the Settlement Agreement.
7 PGA admits that despite the alleged defects in Mr. Maring’s performance, it was able to
8 complete the tender of payment documents, submit them to NMFS, and collect the
9 buyback proceeds. Defs.’ Countercl. ¶ 3.26(a). Under Washington contract law, only a
10 material breach gives the injured party the right to withhold further performance. Bailie
11 Comms., Ltd. v. Trend Bus. Sys., 765 P.2d 339, 342 (Wash. Ct. App. 1988) (citing
12 Restatement (Second) of Contracts § 241). Determining whether a breach is material
13 involves an examination of the following five factors:
14

15 (1) whether the breach deprives the injured party of a benefit which he reasonably
16 expected, (2) whether the injured party can be adequately compensated for the part
17 of that benefit which he will be deprived, (3) whether the breaching party will
18 suffer a forfeiture by the injured party’s withholding of performance, (4) whether
19 the breaching party is likely to cure his breach, and (5) whether the breach
comports with good faith and fair dealing.

20 Id. at 343. While a portion of the transfer documentation was incomplete, PGA was able
21 to successfully receive the buyback proceeds. Therefore, PGA suffered no injury. The
22 court finds that Mr. Maring did not materially breach this condition of the Settlement
23 Agreement.

24 **b. Factual Disputes Prevent the Court From Deciding if Mr.**
25 **Maring Performed His Obligation to Disclose Fishing Permit**
26 **Information.**

27 The Settlement Agreement also requires that Mr. Maring deliver by January 12,
28 2005 “all interests of any kind . . . in Alaska fishing permits of any kind, . . . along with

1 all documentary history . . . and together with a summary chart” Agreement ¶ 3.b.
2 Mr. Maring admits that he delivered a portion of the documentary history approximately
3 two weeks late, but he argues that the late submission does not constitute a breach
4 because the Agreement allows for a rolling production of documents and PGA explicitly
5 authorized that manner of production. Agreement ¶ 3.b (stating that for documents that
6 are unavailable, “Maring shall provide an explanation of the circumstances of the
7 unavailability and shall cooperate fully to locate and provide all such documentation.”).
8 PGA asserts that Mr. Maring did not submit a list of unavailable documents or an
9 explanation of the circumstances of their unavailability. Kornfeld Decl. ¶ 10. PGA
10 denies authorizing a rolling production of documents. *Id.* at ¶ 8. PGA claims that the
11 delay in document production hindered the discovery of the problems associated with the
12 NORTHLAND PQS permit. Greenberg Decl. ¶ 9-10.

14 Taking these disputed facts in the light most favorable to PGA, the late delivery of
15 documentation constitutes a material breach. Paragraph 9 of the Settlement Agreement
16 contains a “time is of the essence” clause applicable to every obligation in the
17 Agreement. Agreement ¶ 9. This provision evidences a mutual intent that there be strict
18 enforcement of specified times of performance. Mid-Town Ltd. P’ship v. Preston, 848
19 P.2d 1268, 1272 (Wash. Ct. App. 1993). When a party does not perform or excuse a
20 condition precedent within the time required, both parties’ contractual duties are
21 discharged. CHG Int’l v. Robin Lee, Inc., 667 P.2d 1127, 1129 (Wash. Ct. App. 1983).
22 The court cannot resolve Mr. Maring’s contention that PGA waived timely performance,
23 because PGA has offered evidence indicating that it did not do so. Kornfeld Decl. ¶ 8.

24 Because the court cannot determine as a matter of law if Mr. Maring complied
25 with the Settlement Agreement’s conditions precedent, the court cannot grant summary
26 judgment on PGA’s liability on the contract.
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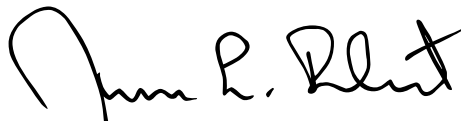
1 **C. The Court Cannot Grant Summary Judgment on PGA's Remaining**
2 **Counterclaims.**

3 Finally, the court turns to PGA's declaratory judgment, breach of contract, and
4 breach of the covenant of good faith and fair dealing. Each counterclaim depends on the
5 resolution of the disputed facts the court has discussed above. For that reason, the court
6 denies Mr. Maring's motion for summary judgment on these counterclaims.

7 **IV. CONCLUSION**

8 For the reasons stated above, the court DENIES Mr. Maring's motion for
9 summary judgment. (Dkt. # 13).

10 Dated this 22nd day of July, 2005.

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13 JAMES L. ROBERT
14 United States District Judge
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